

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
JAMAL KEARSE,

Plaintiff,

-against-

DEPARTMENT OF CORRECTIONS, CAPTAIN
CHESTNUT #1425, OFFICER ALMANZAR #18373,
OFFICER SMITH (11A), DR. ROUCHE,¹

Defendants.

**AMENDED ANSWER TO
THE COMPLAINT ON
BEHALF OF DEFENDANTS
NEW YORK CITY
DEPARTMENT OF
CORRECTION, CAPTAIN
CHESTNUT, CORRECTION
OFFICER ALMANZAR,
CORRECTION OFFICER
SMITH AND P.A. ROCHE**

----- X 08 CV 1503 (GBD)(AJP)

Jury Trial Demanded

Defendants New York City Department of Correction (“DOC”), Captain Chestnut, Correction Officer Almanzar, Correction Officer Smith and Physician’s Assistant Roche, by their attorney, Michael A. Cardozo, Corporation Counsel of the City of New York, for their answer to the complaint, respectfully allege, upon information and belief, as follows:

1. Deny the allegations set forth in paragraph “I” of the complaint and all of its subparts, except admit that plaintiff purports to name the parties as stated therein.
2. Deny the allegations set forth in paragraph “II.A.” of the complaint, except admit that plaintiff was incarcerated at the George R. Vierno Center on August 20, 2007.
3. Deny the allegations set forth in paragraph “II.B.” of the complaint, except admit that plaintiff was housed in unit 11A on August 20, 2007.
4. Deny the allegations set forth in paragraph “II.C.” of the complaint.
5. Deny the allegations set forth in paragraph “II.D.” of the complaint.

¹ Defendants note that pursuant to the Order of the Honorable Andrew J. Peck dated June 10, 2008, Warden Shaw is no longer a defendant in this action.

6. Deny the allegations set forth in paragraph “III” of the complaint.

7. Deny the allegations set forth in paragraph “IV” of the complaint and all of its subparts, except deny knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff’s attempts to file a grievance in connection with the alleged incident.

8. Deny the allegations set forth in paragraph “V” of the complaint, except admit that plaintiff purports to seek relief as stated therein.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph “VI” of the complaint and all of its subparts.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE:

10. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE:

11. Defendants have not violated any rights, privileges or immunities secured to plaintiff by the Constitution or laws of the United States or the State of New York or any political subdivision thereof, nor have defendants violated any act of Congress providing for the protection of civil rights.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE:

12. Defendants Captain Chestnut, Correction Officer Almanzar, Correction Officer Smith and Physician’s Assistant Roche have not violated any clearly established constitutional or statutory right of which a reasonable person would have known and therefore are protected by qualified immunity.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE:

13. At all times relevant to the acts alleged in the complaint, defendants acted reasonably in the proper and lawful exercise of their discretion.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE:

14. Any injury alleged to have been sustained resulted from plaintiff's own culpable or negligent conduct and/or the intervening conduct of third parties and was not the proximate result of any act of the defendants.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE:

15. Plaintiff's claim of failure to treat an alleged injury is barred by his failure to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE:

16. The New York City Department of Correction is a non-suable entity.

WHEREFORE, defendants New York City Department of Correction, Captain Chestnut, Correction Officer Almanzar, Correction Officer Smith and Physician's Assistant Roche request judgment dismissing the complaint in its entirety, together with the costs and disbursements of this action, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 17, 2008

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants Department of Correction,
Captain Chestnut, Correction Officer Almanzar,
Correction Officer Smith and P.A. Roche
100 Church Street
New York, New York 10007
(212) 788-1575

By: /s/
Bradford C. Patrick
Assistant Corporation Counsel
Special Federal Litigation Division

To: BY MAIL
Jamal Kearse, # [REDACTED]
Plaintiff Pro Se
George R. Vierno Center
09-09 Hazen Street
E. Elmhurst, NY 11370

DECLARATION OF SERVICE BY FIRST CLASS MAIL

I, Bradford C. Patrick declare, pursuant to 28 U.S.C. § 1746, under the penalty of perjury that on **June 17, 2008** I served the annexed **Amended Answer to the Complaint on Behalf of Defendants New York City Department of Correction, Captain Chestnut, Correction Officer Almanzar, Correction Officer Smith and P.A. Roche** upon the following individual by depositing a copy of the same, enclosed in a first class postpaid properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service, within the State of New York, directed to the said plaintiff pro se at the address set forth herein, being the address designated by said plaintiff for that purpose, to wit:

Jamal Kearsse, # [REDACTED]
Plaintiff Pro Se
George R. Vierno Center
09-09 Hazen Street
E. Elmhurst, NY 11370

Dated: New York, NY
June 17, 2008

_____/s/
Bradford C. Patrick
Assistant Corporation Counsel
Special Federal Litigation

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OFFICER SMITH and P.A. ROCHE**

MICHAEL A. CARDOZO

*Corporation Counsel of the City of New York
Attorney for Defendants Department of Correction,
Captain Chestnut, Correction Officer Almanzar,
Correction Officer Smith and P.A. Roche
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Bradford C. Patrick
Tel: (212) 788-1575
NYCLIS No.2008-013235*

Due and timely service is hereby admitted.

New York, N.Y., 200.....

..... Esq.

Attorney for.....